IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MARK WESLEY JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 00-1049-SLR
	)	
UNITED PARCEL SERVICE,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

I. INTRODUCTION

On December 15, 2000, plaintiff Mark Wesley Jones filed a complaint against defendant United Parcel Service alleging violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., ("ADA"). Plaintiff claims that defendant failed to accommodate his disability upon repeated requests for accommodations and assistance. The court has jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331. Currently before the court is defendant's motion to dismiss the complaint for failure to timely file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (D.I. 21) Since defendant submitted documents in support of its motion to dismiss, the court will review the motion as one for summary judgment. (D.I. 24) For the following reasons, defendant's motion is denied.

II. BACKGROUND

Plaintiff was hired by defendant on March 28, 1989 as a full-time Feeder Driver in its Christiana, Delaware facility. (D.I. 1, 22) The duties of Feeder Driver include, inter alia, coupling trailers and tractors together; moving a dolly physically in position for coupling; and assisting in moving packages and equipment of up to 150 pounds. (D.I. 23 at A-1)

On April 11, 1997, plaintiff sustained a back injury while at work. (D.I. 13) Plaintiff was diagnosed with "a ruptured disk that is fragmented" on May 9, 1997, and underwent surgery on May 20, 1997. (D.I. 1) Thereafter, plaintiff requested to return to work with medical restrictions that limited "bending," "lifting, no greater than 75 pounds," and "no dolly," per his physician's orders on February 6, 1998. (Id.; D.I. 23 at A-7) Defendant denied plaintiff's request to return to work from February 16, 1998 until October 5, 1998, at which time plaintiff returned to work without the above restrictions. (D.I. 13) On August 16, 1999, plaintiff suffered another back injury. Consequently, he underwent another medical procedure on August 30, 1999. (Id.; D.I. 13)

Plaintiff claims that he made several requests for accommodations and alternative work, filed grievances and wrote letters, and that all such requests were denied by defendant. (D.I. 1, 13) Plaintiff alleges that defendant "would not return

me to work even after being released by doctors, until I filed charges with the state of Delaware." (Id.) In addition, plaintiff claims that defendant was fully aware of his disability and has denied a request for an ergonomical truck that is available for use. (D.I. 1) Moreover, plaintiff alleges that other employees, disabled and non-disabled, have been given these accommodations upon request. (Id.)

Plaintiff filed a charge of discrimination with the EEOC on August 31, 1999, alleging the discriminatory conduct began on February 16, 1998 and continued through May 13, 1999. (Id.) The EEOC issued a Notice of Right to Sue letter on September 26, 2000. (Id.)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden to demonstrate that no genuine issue as to any material fact is present. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the

burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

However, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat a properly supported motion for summary judgment; the function of this motion is to weigh the evidence and determine if a genuine issue is present for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The court's role with respect to summary judgment motions in discrimination cases is "'to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a

genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff.'" Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993)(quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

IV. DISCUSSION

To state a viable claim of discrimination based on disability, an aggrieved party must file a charge of discrimination with the EEOC within 300 days of the last alleged discriminatory practice by the employer. See 29 U.S.C. § 626(d)(2); 29 C.F.R. § 1614.604(d).

In the case at bar, defendant claims that

> [i]t is undisputed that the Company returned Plaintiff to his position once he had been released by his physician to full duty on October 5, 1998. In order for Plaintiff's claim of discrimination to be properly before this Court, then, he must have filed his Charge **on or before July 31, 1999**, which is 300 days after October 4, 1998, the last day Plaintiff alleges he was wrongfully denied the right to return to work.

(D.I. 22 at 7 (emphasis in original)) However, the last day plaintiff alleges he was wrongfully denied accommodations to his disabilities was **May 13, 1999**, which permitted him until **March 8, 2000** to timely file his charge. (D.I. 1) Viewing all reasonable inferences in favor of plaintiff, the court finds that plaintiff did timely file his charge of discrimination with the EEOC.

V. CONCLUSION

Therefore, at Wilmington, this 23rd day of May, 2002;

IT IS ORDERED that defendant's motion to dismiss (D.I. 21) is denied.

IT IS FURTHER ORDERED that, on or before **June 21, 2002**, plaintiff shall inform the court whether he intends to pursue this litigation, given his failure to respond to defendant's motion to dismiss. **NOTE: FAILURE TO TIMELY RESPOND SHALL RESULT IN DISMISSAL OF THIS CASE**.

Sue L. Robinson
United States District Judge